95-1222

Supreme Court, U.S.
FILED
JAN 30 1996
CLERK

CASE NO. _____

SUPREME COURT OF THE UNITED STATES
October Term 1995

CLARENCE N. S. SHAK, Plaintiff (Appellant),

vs.

KEITH TANAKA, individually and as a police officer in the City and County of Honolulu, State of Hawaii,

MICHAEL NAKAMURA, individually and as the Chief of Police of the City and County of Honolulu, State of Hawaii,

KATHERINE DASHIELL, individually and as a Judge in the District Court of the First Circuit, State of Hawaii,

SABRINA MCKENNA, individually and as a Judge in the District Court of the First Circuit, State of Hawaii,

KEITH KANESHIRO, ESQ. individually and as the Prosecuting Attorney for the City and County of Honolulu, State of Hawaii, and

STATE OF HAWAII,
Defendants (Appellees).

Petition for Writ of Certiorari to
the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Submitted by CLARENCE SHAK, Appellant pro se
610 Cooke Street, Apt. No. 211, Honolulu, Hawaii 96813
Telephone No. (808) 591-0108

QUESTIONS PRESENTED

I - May a state, without violating the right to personal liberty guaranteed to all persons in the United States by the Fourth Amendment of the U. S. Constitution, arrest and take into custody a person (such as Plaintiff-Appellant in the instant case) who has been observed by a police officer committing an act which the officer believes to be a crime and put him or her on trial without any determination having been made in the case by any judicial officer that probable cause existed to believe that that person had committed a crime?

II - May a state, without disregarding the right secured to all persons in the United States by the Fourteenth Amendment of the U. S. Constitution to enjoy immunity from being deprived of liberty or property without due process of law, put a person (such as Plaintiff-Appellant in the instant case) on trial in a court of law and sentence that person to pay a fine if found guilty as charged without that court having jurisdiction over the offense charged?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Jurisdictional Statement 1

Constitutional Provisions, Statutes, and Regulations Involved in this Case 1

Statement of the Case 6

Reasons Relied On for the Allowance of the Writ of Certiorari 10

APPENDIX

Memorandum filed in the U. S. Court of Appeals for the Ninth Circuit on August 22, 1995 iv

Order filed in the U. S. Court of Appeals for the Ninth Circuit on December 1, 1995 x

Judgment filed in the U. S. Court of Appeals for the 9th Circuit on August 22, 1995 and in the District Court for the District of Hawaii on December 14, 1995 xi

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION — Pages

Amendment 4 ..... i,1

Amendment 5 2

Amendment 14 ..... i,2

UNITED STATES CODE

Title 28 - §1254 1,2
Title 28 - §1291 v
Title 28 - §1331 3,8
Title 42 - §1983 ..... v,3,8

HAWAII REVISED STATUTES

§291C-76 ..... v,3,6
§291C-77 ..... v,4,6
§291C-172 ..... v,5,6

HAWAII RULES OF PENAL PROCEDURE

Rule 5 (b)(1) ix,5

CASES

County of Riverside v. McLaughlin
500 U.S. 44 ..... viii,10,11
Albrecht v. United States, 273 U.S. 1 ..... 12, 13
Ex parte Bain, 121 U.S. 1 ..... 12, 13
Gerstein v. Pugh, 420 U.S. 103 ..... vii,10,11
Hansen v. United States, 7 F3d 137, 138 ..... vi, viii
James v. Reese, 546 F2d 325, 327-28 viii
Shak v. Doi, 420 P2d 100, 102 ix

JURISDICTIONAL STATEMENT

This petition for a writ of certiorari is hereby being presented to this Court to review a judgment filed and entered in the United States Court of Appeals for the Ninth Circuit on August 22, 1995.

An order was filed on December 1, 1995 denying a petition for rehearing which had been filed in this case on September 5, 1995.

The statutory provision believed to confer on this Court jurisdiction to review the above mentioned judgment is Title 28 of the U. S. Code, §1254(1) which provides that cases in the courts of appeal may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of a judgment or decree.

CONSTITUTIONAL PROVISIONS , STATUTES, AND REGULATIONS INVOLVED IN THIS CASE

UNITED STATES CONSTITUTION

Amendment 4

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

Title 28

§1254

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of a judgment or decree.

§1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 42

§1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. [R.S. §1979; Dec. 29, 1979, P. L. 96-170, §1, 93 Stat. 1284.]

HAWAII REVISED STATUTES

§291C-76 - Pedestrians on roadways

(a) Where sidewalks are provided it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway, bicycle lane, or bicycle path.

(b) Where sidewalks are not provided any pedestrian walking along and upon a highway shall, when practicable, walk only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction. [L1971, c150, pt of §1; am L 1977, c180 § 4]

§291C-77 - Pedestrians soliciting rides, business or attention of motorist

(a) Except as otherwise provided by county ordinance, no person shall stand in, walk along, or otherwise occupy a portion of a highway for the purpose of soliciting a ride, employment, business, or contributions from the occupant of any vehicle.

(b) No person shall stand on or in proximity to a street or highway for the purpose of soliciting the watching or guarding of any vehicle while parked or about to be parked on a street or highway.

(c) Except as otherwise provided by county ordinance, no person shall hold or display a movable sign within the right-of-way boundaries of a public highway or on the sidewalk abutting a public highway or in an area adjacent to the highway for the purpose of carrying on political campaign activities as defined in section 19-6(7) and which seek to draw the attention of occupants of motor vehicles using the highway. A movable sign is any portable device, display, emblem, billboard, notice, picture, painting or writing, other than official signs placed or required by the state or county. [L 1971, c150, pt of §1; am L 1973, c 216 §2]

§291C-172 - Refusal to provide identification

Any person detained for a violation of this chapter shall provide the person's name and address, or any proof thereof, or both, upon the lawful order or direction of any police officer in the course and scope of the officer's duties pursuant to this chapter. [L 1978, c111, pt of §2, am L 1984, c215 §1]

HAWAII RULES OF PENAL PROCEDURE

Rule 5

(b) Offenses Other Than Felony

(1) Arraignment

In the district court, if the offense charged against the defendant is other than a felony, the complaint shall be filed or the oral charge stated, a copy of such charge and any affidavits in support thereof shall be furnished the defendant upon his request, and proceedings shall be had in accordance with this section (b). Arraignment shall be in open court and shall consist of the reading of the complaint or the statement of the oral charge to the defendant, or stating to him the substance of the charge and calling on him to plead thereto. In addition to the requirements of Rule 10.1, the court shall in appropriate cases inform the defendant that he has a right to jury trial in the circuit court or may elect to be tried without a jury in the district court.

STATEMENT OF THE CASE

On December 23, 1993, at approximately 4:45 pm, in the City and County of Honolulu, State of Hawaii, CLARENCE N. S. SHAK, Plaintiff-Appellant in this case (hereinafter called Plaintiff) was arrested and taken into custody by Defendant-Appellee Police Officer Keith Tanaka (hereinafter referred to as Officer Tanaka) for having violated Hawaii Revised Statutes (hereinafter "HRS") §291C-76 (Pedestrians on Roadways), HRS §291C-77 (Pedestrians soliciting rides, business or attention of motorist) and HRS §291C-172 (Refusal to provide identification). This arrest of Plaintiff by Officer Tanaka was made without any warrant having been issued for Plaintiff's arrest.

After Plaintiff was arrested, he was transported to the Honolulu Police Station where he was fingerprinted, booked, and then incarcerated in a jail cell. By posting sixty dollars in bail, Plaintiff secured his pre-trial release from custody at approximately 6:30 pm that same day on the condition that he appear for his arraignment set to be heard in the District Court of Honolulu, State of Hawaii, on December 29, 1993.

At Plaintiff's appearance in the District Court of Honolulu on December 29, 1993, Plaintiff asked the court, Defendant-Appellee Judge Dashiell presiding, to produce the formal accusation or accusations, if any had been filed in that court, charging Plaintiff with the commission of any act or acts which violated any law. When the court was unable to produce any written accusation, not even an affidavit, citation, complaint or information, Plaintiff called the court's attention to the fact that the court lacked jurisdiction over the subject-matter in the case and therefore did not have the power to proceed any further in the case.

Evidently having decided that the court did have subject-matter jurisdiction in the case, Judge Dashiell instructed the Deputy Prosecuting Attorney who was prosecuting the case to proceed with the case by reading to Plaintiff the offenses he had been accused by Officer Tanaka of having committed. The Deputy complied by reading to Plaintiff directly out of the law books the description of the offenses he had been accused of having committed.

After Plaintiff declined to enter a plea to the charges so read to him, Judge Dashiell took it upon herself to enter a plea of "Not Guilty" on Plaintiff's behalf. Plaintiff was thereafter issued a written order from the District Court of the First Circuit, State of Hawaii (also known as the District Court of Honolulu) to appear for his trial on March 17, 1994.

At Plaintiff's appearance for his trial in the District Court of Honolulu on March 17, 1994, Defendant-Appellee Judge Sabrina McKenna (hereinafter referred to as Judge McKenna) presiding, Plaintiff asked the court to produce the formal accusation or accusations, if any had been filed in that court, charging Plaintiff with the commission of any act or acts which violated any law. When the court was unable to produce any written accusation, not even an affidavit, citation, complaint or information, Plaintiff moved to have his case dismissed on the grounds that the court lacked jurisdiction over the subject matter in this case. This motion was denied by Judge McKenna.

Judge McKenna then instructed the Deputy Prosecuting Attorney who was prosecuting the case to proceed with the case by reading to Plaintiff the offenses he had been accused of committing. The Deputy complied by reading to Plaintiff directly out of the law books the description of the offenses he had been accused of having committed. After Plaintiff declined to enter a plea to the

charges so read to him, Judge McKenna took it upon herself to enter a plea of "Not Guilty" on Plaintiff's behalf. The court then proceeded to put Plaintiff on trial.

At the trial of Plaintiff, Officer Tanaka testified as to what he had witnessed Plaintiff doing on December 23, 1993 which led him to believe that Plaintiff had violated certain laws of the state of Hawaii. Based on the testimony of Officer Tanaka, Judge McKenna found Plaintiff guilty of the three charges which had been orally read to him by the Deputy Prosecuting Attorney but which were not supported by any written document and sentenced Plaintiff to pay a total fine of approximately thirty five dollars for having committed those three offenses.

This conviction of Plaintiff was not appealed.

A Complaint was filed by Plaintiff on April 14, 1994 in the U. S. District Court for the District of Hawaii against all named Defendants in this case seeking judgment against them for general and punitive damages for having deprived Plaintiff, under color of law, of his personal liberty and his property without conforming to due process of law in violation of the Fourth and Fourteenth Amendments to the U. S. Constitution.

Title 28 of the U. S. Code, §1331, which gives U. S. district courts original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States and Title 42 of the U. S. Code, §1983, which provides that the Defendants in this case are liable to any person, such as Plaintiff in this case, if they, under color of law, subject that person, or cause that person to be subjected, to being deprived of any right, privilege or immunity secured to him or her by the Constitution of the United States provide the basis for federal jurisdiction in the United States District Court for the District of Hawaii in this case.

On July 27, 1994, after a hearing was held on a Motion to Dismiss or in the alternative a Motion for Summary Judgment filed by Defendants, the U. S. District Court for the District of Hawaii found that there was "nothing wrong with the procedure that was followed" by Defendants in depriving Plaintiff of his liberty and property so ordered that Defendant's Motion for Summary Judgment be granted. This order was filed with the U. S. District Court on August 9, 1994. A Summary Judgment was thereafter entered in the U. S. District Court in this case in favor of Defendants against Plaintiff and it was further ordered that all claims against all Defendants were dismissed with prejudice.

On August 19, 1994, a Notice of Appeal was filed with the U. S. District Court for the District of Hawaii by Plaintiff appealing to the United States Court of Appeals for the Ninth Circuit from the Summary Judgment entered against him in this case on August 12, 1994.

On August 22, 1995, a judgment was rendered by the United States Court of Appeals for the Ninth Circuit affirming the Summary Judgment entered against Plaintiff in this case by the U. S. District Court for the District of Hawaii on August 12, 1994.

On December 1, 1995, an order was filed in the U. S. Court of Appeals for the Ninth Circuit denying a petition for rehearing which had been filed in this case in that court on September 5, 1995.

On December 14, 1995, the judgment filed and entered on August 22, 1995 in the U. S. Court of Appeals for the Ninth Circuit affirming the judgment of the U. S. District Court in this case was filed in the U. S. District Court.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

It is here believed that a writ of certiorari should be allowed in the instant case because the United States Court of Appeals for the Ninth Circuit has rendered a decision on the two federal questions hereby being presented to this Court in a way that clearly conflicts with applicable decisions already made by this Court.

This Court, for instance, has already answered in the negative in more than one of its decisions the question of whether a state may, without violating the right to personal liberty guaranteed to all persons in the United States by the Fourth Amendment of the U. S. Constitution, arrest and take into custody a person (such as Plaintiff-Appellant in the instant case) who has been observed by a police officer committing an act which the officer believes to be a crime and put him or her on trial without any determination having been made in the case by any judicial officer that probable cause existed to believe that that person had committed a crime.

In *Gerstein v. Pugh*, 420 U.S. 103 at 114, 125 (1975), this Court first established that "...the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest ... and this determination must be made by a judicial officer either before or promptly after arrest."

In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), this Court not only reinforced its holding made in *Gerstein* that anyone arrested without a warrant was entitled to a judicial determination of probable cause "promptly after

arrest" but also established guidelines to clarify the meaning of the word "promptly" as used in *Gerstein*. In its decision in *County of Riverside*, this Court established that if a person had become entitled to a judicial determination of probable cause promptly after an arrest, such a determination did not have to be made "immediately" after the arrest has been made but could be made as long as 48 hours after a person had been so arrested and still, in general, meet the test of having been made "promptly."

In the instant case, the uncontroverted facts reveal that although Plaintiff-Appellant was arrested without a warrant, no judicial officer ever subsequently made any determination that there was probable cause to believe that Plaintiff-Appellant had committed any offense. Yet the Ninth Circuit Court of Appeals, apparently in knowing disregard of the decisions rendered by this Court in *Gerstein* and in *County of Riverside*, affirmed the decision of the U. S. District Court of the District of Hawaii that there was "nothing wrong" with the way that the state had arrested and taken Plaintiff-Appellant into custody and had put him on trial even though no judicial determination had ever been made that there was probable cause to believe that he had committed any offense.

This Court has already also clearly answered in the negative the second question hereby being presented to this Court as to whether a state may, without disregarding the right secured to all persons in the United States by the Fourteenth Amendment of the U. S. Constitution to enjoy immunity from being deprived of liberty or property without due process of law, put a person (such as Plaintiff-Appellant in the instant case) on trial in a court of law and sentence that person to pay a fine if found guilty as charged without that court having jurisdiction over the offense charged.

It is here understood that in *Albrecht v. United States*, 273 U.S. 1 at 8 (1927), this Court held that if there is filed in any court an "appropriate accusation" of an accused person, such as by the filing of an indictment or information, that court thereby acquires jurisdiction over the offense that that person is accused of having committed so that if thereafter the accused person makes a court appearance, voluntary or otherwise, that court thereby acquires jurisdiction over the person of the defendant. However, this Court cautioned, "A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court. Compare *Ex parte Bain*, 121 U.S. 1."

It is here evident that this Court, in *Albrecht*, by making the above cautionary statement meant that unless a formal and sufficient accusation is in writing--like an indictment or information--so that it could be filed and has been filed with a certain court, that court has not acquired any power (jurisdiction) to proceed with hearing any certain case where a person may "be punished for a crime."

This rule, in effect, is the same as the rule this Court established in the *Bain* case where since a change had been made in the original indictment issued by a grand jury, this Court held that the changed indictment was "no longer an indictment of a grand jury." Therefore, this Court said at page 13 of *Bain*, since there was no longer any indictment [or written accusation] filed in the case, "...the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment [or written accusation]...The power of the court to proceed to try the prisoner is as much arrested as if the indictment [or written accusation] had been dismissed or a *nolle prosequi* had been entered."

Before this court rendered its decision in the *Albrecht* case, its finding in the *Bain* case with respect to the absence of jurisdiction of a court over an offense which did not have a written accusation filed with that court accusing a certain person of having committed that certain offense was limited in its application to cases involving capital or otherwise infamous crimes. However, the decision this Court rendered in *Albrecht* left no doubt that in order for any court to be able to proceed with hearing any case in which any person is accused of having committed any certain offense, that court must first acquire jurisdiction over the offense charged and that jurisdiction is acquired only by having a formal written accusation against a certain person filed with that court.

In the instant case, the uncontroverted facts reveal that no written accusation was ever filed against Plaintiff-Appellant in any court accusing him of having committed the offenses he was orally charged with having committed, yet the trial court assumed it had jurisdiction over him, put him on trial and sentenced him to pay a fine to the state. Yet the Ninth Circuit Court of Appeals, in apparent disregard for the decisions rendered by this Court in *Albrecht* and in *Bain*, affirmed the decision of the U. S. District Court of the District of Hawaii that there was "nothing wrong" with the way the state had put Plaintiff-Appellant on trial and had sentenced him to pay a fine to the state even though the court lacked jurisdiction over the offenses he was charged with having committed in his case .

Respectfully submitted,

Clarence Shak

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APPENDIX

Memorandum filed in the United States Court of Appeals for the Ninth Circuit on August 22, 1995 acknowledged by Cathy A. Catterson, Clerk, U. S. Court of Appeals.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE SHAK,	) No. 94-16505
	)
Plaintiff-Appellant,	) D. C. No.
	) CV-94-00282-SPK
v.	)
	)
KEITH TANAKA, individually and as police officer in the City and County of Honolulu; KATHERINE DASHIELL, individually and as a Judge in the District Court of the First Circuit, State of Hawaii; STATE OF HAWAII, et al.,	) MEMORANDUM*
	)
Defendants-Appellees.	)

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, District Judge, Presiding

Submitted August 16, 1995**

Before: ALARCÓN, FERNANDEZ, and RYMER, Circuit Judges.

Clarence N. S. Shak appeals pro se from the district court's summary judgment for defendants in his action brought under 42 U.S.C. §1983, which alleged a violation of his rights under the Fourth and Fourteenth Amendments.

On appeal, Shak contends that the district court erred as a matter of law by holding that he was not entitled to: (1) a judicial determination of probable cause before being required to return to court for a hearing on misdemeanor charges; and (2) a written summary of the misdemeanor charges against him, setting forth the essential facts constituting the offenses charged and demonstrating that there was probable cause to believe that those offenses had been committed by him. We have jurisdiction under 28 U.S.C. §1291, and we affirm.

I
Background

On December 23, 1993, at approximately 4:45 p.m., after being warned once that he was creating a safety hazard by standing in the street, Shak was arrested by defendant police officer Tanaka for violating local laws prohibiting pedestrians from walking on roadways, see Haw. Rev. Stat. §291C-76 (1985), soliciting rides, business or attention of motorists, see Haw. Rev. Stat. §291C-77 (1985), and refusing to provide identification, see Haw. Rev. Stat.§291C-172 (1985). Shak was then taken by officer Tanaka to the Honolulu Police Station where he was finger-printed, booked,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

and then released on approximately $60.00 bail at approximately 6:30 p.m. Upon his release, Shak was given a bail receipt informing him of the three misdemeanor charges against him and the time he was to appear in court for a hearing on such charges.

On December 29, 1993, Shak appeared for arraignment in the District Court for the First Circuit, Honolulu Division. After having the charges against him read orally, Shak refused to enter any plea, arguing that the court lacked jurisdiction over the subject matter of his case because no complaint, affidavit, or other formal accusation had been filed against him charging him with any act which violated any law. Consequently, the court entered a plea of "not guilty" on Shak's behalf and set the date of trial for March 17, 1994.

On March 17, 1994, Shak again appeared at court, the charges against him were again read orally, Shak again refused to enter a plea, and the court again entered a plea of "not guilty" on Shak's behalf. Shak then moved to dismiss the charges against him on the ground that the court lacked jurisdiction, which the court denied. The trial proceeded, officer Tanaka testified as to what he had seen Shak doing which led him to believe that he was violating the law, and the court found Shak guilty of all three of the charges based on Tanaka's testimony. Shak was subsequently fined $35, and he did not appeal his conviction.

II
Standard of Review

We review de novo the district court's grant of summary judgment. Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993). Summary judgment is appropriate if, viewing the evidence in the light most favorable to the non-moving party, no genuine issues of material fact remain and the

moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Hansen, 7 F.3d at 138.

III
Merits

A. Judicial Determination of Probable Cause

Shak contends that the district court erred by holding that he was not entitled to a judicial determination of probable cause before being required to return to court for a hearing on misdemeanor charges. This contention lacks merit.

The Supreme Court "has expressed a preference for the use of arrest warrants when feasible." Gerstein v. Pugh, 420 U.S. 103, 113 (1975). Nonetheless, "a [police officer]'s on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." See id. at 113-114. A person arrested and held in custody for trial, however, is entitled to a timely judicial determination of probable cause. Id. at 114. The Supreme Court has explained that "[o]nce the suspect is in custody. . ., the reasons that justify dispensing with the magistrate's neutral judgment evaporate" while "the suspect's need for a neutral determination of probable cause increases significantly," noting that "prolonged detention may be more serious than the interference occasioned by arrest." Id. at 114.

Here, Shak concedes that: (1) officer Tanaka had probable cause to arrest him; and (2) his detention at the Honolulu Police Station for one hour and forty-five minutes was not excessive. Thus, the two Fourth Amendment concerns discussed in Gerstein, a warrantless arrest in which the police officer's judgment concerning probable cause is

mistaken and prolonged detention, are not present in the instant case.

In addition, the Supreme Court has "stopped short of holding that jurisdictions were constitutionally compelled to provide a probable cause hearing immediately upon taking a suspect into custody and completing booking procedures." see County of Riverside v. McLaughlin, 500 U.S. 44, 53-54 (1991), and "acknowledged the burden that proliferation of pretrial proceedings places on the criminal justice system and recognized that the interests of everyone involved, including those persons who are arrested, might be disserved by introducing further procedural complexity into an already intricate system." Id.

Accordingly, the district court did not err as a matter of law in dismissing Shak's claim that he had a right to a probable cause hearing before being required to return to court.

B. Written summary of Charges

Shak contends that the district court erred by holding that due process did not entitle him to a written summary of the misdemeanor charges against him, setting forth the essential facts constituting the offenses charged and demonstrating that there was probable cause to believe that those offenses had been committed by him. This contention lacks merit.

"The grand jury requirement of the Fifth Amendment is not applicable to the states, and accordingly, prosecution via an information is not unconstitutional." James v. Reese 546 F.2d 325, 327-28 (9th Cir. 1976). Moreover, "a misdemeanor conviction may be sought and sustained upon the basis of an unverified Information standing alone."

Church v. United States, 412 F.2d 836, 838 (9th Cir. 1969) (emphasis added). Accordingly, the State of Hawaii was not required to proceed against Shak by indictment.

Under the Hawaii Rules of Penal Procedure, in non-felony cases, the accused is orally apprised of the pending charges in open court. Haw. R. Penal P.§5(b)(1). The Supreme Court of Hawaii, moreover, has rejected the claim that the omission to furnish a copy of a complaint is a jurisdictional defect. Shak v. Doi, 420 P.2d 100, 102 (1966). Here, Shak had the formal charges read to him orally twice and was also given a bail receipt informing him of the charges and the time to appear in court. Shak does not allege, moreover, that he did not understand the nature of the charges against him. Consequently, the district court properly ruled that Shak was not entitled to a detailed written summary of the misdemeanor charges.

AFFIRMED.

Order filed in the United States Court of Appeals for the Ninth Circuit on December 1, 1995 acknowledged by Cathy A. Catterson, Clerk, U. S. Court of Appeals.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE SHAK,	)	No. 94-16505
	)	
Plaintiff-Appellant,	)	D. C. No.
	)	CV-94-00282-SPK
v.	)	Hawaii (Honolulu)
	)	
KEITH TANAKA, individually and as police officer in the City and County of Honolulu; KATHERINE DASHIELL, individually and as a Judge in the District Court of the First Circuit, State of Hawaii; STATE OF HAWAII, et al.,	)	ORDER
	)	
Defendants-Appellees.	)	
	)	

Before: ALARCÓN, FERNANDEZ, and RYMER, Circuit Judges.

The petition for rehearing is denied.

Judgment filed in the U. S. Court of Appeals for the 9th Circuit on August 22, 1995 and in the U. S. District Court for the District of Hawaii on December 14,1995

****

JUDGMENT

= =

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-16505
CT/AG#: CV-94-00282-SPK

CLARENCE SHAK

Plaintiff - Appellant

v.

KEITH TANAKA, individually and as police officer in the City and County of Honolulu; KATHERINE DASHIELL, individually and as a Judge in the District Court of the First Circuit, State of Hawaii; STATE OF HAWAII, et al.,

Defendants - Appellees.

APPEAL FROM the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered August 22, 1995

(2)

Supreme Court, U.S.
FILED
MAR 27 1996
CLERK

No. 95-1222

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

CLARENCE N. S. SHAK, *Petitioner,*

vs.

KEITH TANAKA, individually and as a police officer in the City and County of Honolulu, State of Hawaii, MICHAEL NAKAMURA, individually and as the Chief of Police of the City and County of Honolulu, State of Hawaii, KATHERINE DASHIELL, individually and as a Judge in the District Court of the First Circuit, State of Hawaii, SABRINA MCKENNA, individually and as a Judge in the District Court of the First Circuit, State of Hawaii, KEITH KANESHIRO, ESQ., individually and as the Prosecuting Attorney for the City and County of Honolulu, State of Hawaii, and STATE OF HAWAII, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS KEITH TANAKA, MICHAEL NAKAMURA, AND KEITH KANESHIRO'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTIONS PRESENTED

1. Whether Respondents Keith Tanaka and Michael Nakamura violated Clarence N. S. Shak's constitutional right to due process under the Fourth and Fourteenth Amendments of the United States Constitution by arresting and briefly detaining him without a judicial determination of probable cause?

2. Whether Respondents Keith Tanaka, Michael Nakamura, and Keith Kaneshiro violated Clarence N. S. Shak's constitutional right to due process under the Fourth and Fourteenth Amendments of the United States Constitution by arresting, detaining, and arraigning him without filing and providing Mr. Shak with a formal written complaint prior to a court hearing?

CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ..... ii-iii

TABLE OF AUTHORITIES ..... iv-vi

JURISDICTIONAL STATEMENT 1

CONCISE STATEMENT OF THE CASE 1

A. FACTUAL BACKGROUND 1

B. PROCEDURAL BACKGROUND 4

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED 5

A. SUMMARY OF ARGUMENT 5

B. THE WRIT PRESENTS NO FEDERAL QUESTION APPROPRIATE FOR REVIEW BY THIS COURT SINCE THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT DECISION IN THE INSTANT CASE AND APPLICABLE UNITED STATES SUPREME COURT PRECEDENTS 6

1. The Ninth Circuit Properly Looked To State Law To Determine That Petitioner's Detention For Approximately One Hour And Forty-Five Minutes In Order For The Officer To Take Reasonable Administrative Steps Incident To Arrest Was Well Within Hawaii's Forty-Eight Hour Maximum Time Limit For Detention Without A Judicial Determination Of Probable Cause. There

Is No Inconsistency With This Court's Decisions in Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), and County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). 6

2. Mr. Shak Was Not Entitled To A Grand Jury Indictment Since A Misdemeanor Conviction May Be Sought And Sustained On The Basis Of An Information Standing Alone. There Is No Inconsistency With The Ninth Circuit's Decision In The Instant Case And This Court's Decisions in In the Matter of George M. Bain, Jr., 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887) and Albrecht v. United States, 273 U.S. 1, 47 S.Ct. 250, 71 L.Ed. 505 (1927). 13

C. THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT DECISION IN THE INSTANT CASE AND DECISIONS IN OTHER CIRCUIT COURTS OF APPEALS THAT FORMAL ARRAIGNMENT IS NOT NECESSARY, AND THERE IS NO DENIAL OF DUE PROCESS, WHERE AN ARRESTEE IS FULLY INFORMED OF THE CHARGES AND IS ADEQUATELY ABLE TO DEFEND AGAINST THEM 18

D. CONCLUSION 22

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Albrecht v. United States, 273 U.S. 1, 47 S.Ct. 250, 71 L.Ed. 505 (1927) 14-18

Bey v. United States, 419 U.S. 1003 (1974) 20

Bradley v. United States, 447 F.2d 264, 270 (8th Cir. 1971), vacated on other grounds, 404 U.S. 567 (1972) 19

Church v. United States, 412 F.2d 836, 838 (9th Cir. 1969) 17

County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) 7, 12, 13

Dell v. State of Louisiana, 468 F. 2d 324, 325 (5th Cir. 1972) 19

Garland v. Washington, 232 U.S. 642, 645 (1914) 19

Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) 7, 8, 12

Grote v. United States, 454 U.S. 819 (1981) 20

Hart v. U.S., 409 U.S. 861 (1972) 19

In the Matter of George M. Bain, Jr., 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887) 14, 17

James v. Reese, 546 F.2d 325, 327-28 (9th Cir. 1976) 15

Kanekoa v. City and County of Honolulu, 879 F.2d 607 (9th Cir. 1989), cert. denied, 500 U.S. 933 (1991) 10, 11

Merritt v. Hunter, 170 F.2d 739, 741 (10th Cir. 1948) 21

Morford v. Hocker, 394 F.2d 169 (9th Cir. 1968) 15

Ray v. United States, 192 F.2d 658, 659 (5th Cir. 1951) 21

Richardson v. United States, 217 F.2d 696, 698 (8th Cir. 1954) (emphasis added) 21

Shak v. Doi, 49 Haw. 404, 406, 420 P.2d 100, 102 (1966) 21

State of Hawaii v. Langley, 62 Haw. 79, 81, 611 P.2d 130, 132 (1980) 9

State of Hawaii v. Vance, 61 Haw. 291, 302-303, 602 P.2d 933, 940-941 (1979) 9

U.S. v. Shephard, 21 F. 3d 933, 936 (9th Cir. 1994) 9

United States v. Bey, 499 F.2d 194, 201 (3d Cir. 1974), cert. denied 20

United States v. Grote, 632 F.2d 387, 389 (5th Cir. 1980), cert. denied 20

United States v. Hart, 457 F.2d 1087, 1089 (10th Cir. 1972), cert. denied 19

United States v. Romero, 640 F.2d 1014, 1015 (9th Cir. 1981) 18, 20

Text and Treatises

Federal Practice and Procedure, §162, at 551, 552 (1982) 20

Statutes

42 U.S.C. §1983 1
HRS §291C-76 3
HRS §291C-77 3
HRS §291C-172 3
HRS §803-9(5)..... 10, 12
Hawaii Rules of Penal Procedure Rule 5(b)(1) 20

JURISDICTIONAL STATEMENT

Jurisdiction in this Court is invoked pursuant to 28 U.S.C. Section 1254 (1). Jurisdiction in the Ninth Circuit Court of Appeals was conferred by 28 U.S.C. Section 1291 on a final judgment entered on August 12, 1994.

CONCISE STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

In the District Court, Petitioner Clarence N.S. Shak ("Mr. Shak") alleged violations of his constitutional right to due process under 42 U.S.C. § 1983 against Respondents Keith Tanaka ("Officer Tanaka"), individually and as a police officer of the City and County of Honolulu, State of Hawaii, Michael Nakamura ("Chief Nakamura"), individually and as Chief of Police of the City and County of Honolulu, State of Hawaii, Keith Kaneshiro ("Prosecutor Kaneshiro"), individually and as the Prosecuting Attorney for the City and County of Honolulu, State of Hawaii, Kathleen Dashiell ("Judge Dashiell"), individually and as a Judge of the District Court of the First Circuit, State of Hawaii, Sabrina McKenna ("Judge McKenna"), individually and as a Judge of the District Court of the First Circuit, State of Hawaii, and the State of Hawaii. Excerpts of Record ("E.R.") 1-11.

The uncontroverted facts[1] show that on December 23, 1993, at approximately 4:20 p.m., Officer Tanaka was on duty in his patrol car in the vicinity of Piikoi Street and Lunalilo Street. Clerk's Record 15 ("C.R. 15").[2] Officer Tanaka observed Mr. Shak standing within the traveled lanes of Piikoi Street (C.R. 15), while Mr. Shak distributed written material to motorists. Transcript of Proceedings ("Tr.") 7/27/94 at 20. Officer Tanaka approached Mr. Shak and told Mr. Shak to stop entering the roadway because he was causing a safety hazard to himself and traffic. C.R. 15. Officer Tanaka then left Mr. Shak on the sidewalk and responded to another call. C.R. 15.

At approximately 4:45 p.m. on the same day, Officer Tanaka returned to the area of Piikoi Street and Lunalilo, where he again observed Mr. Shak standing in the roadway of Piikoi Street. C.R. 15. Again, Officer Tanaka asked Mr. Shak to step over to the sidewalk, and after a few moments of conversation, Officer Tanaka arrested Mr. Shak for violating

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[1] On page 1 of his Memorandum in Opposition to Defendants Keith Tanaka, Keith Kaneshiro and Michael Nakamura's Motion to Dismiss or in the Alternative Motion for Summary Judgment (see Clerk's Record 17), Mr. Shak conceded that he did not dispute any of the facts contained in Defendants Keith Tanaka, Keith Kaneshiro and Michael Nakamura's Supplemental Memorandum in Support of Motion to Dismiss or in the Alternative Motion for Summary Judgment (*see* Clerk's Record 15).

[2] All citations to "C.R. 15" refer specifically to the factual background on page 2 of Defendants Keith Tanaka, Keith Kaneshiro and Michael Nakamura's Supplemental Memorandum in Support of Motion to Dismiss or in the Alternative Motion for Summary Judgment, which is contained in Clerk's Record 15.

Hawaii Revised Statutes (hereinafter "HRS") § 291C-76 (Pedestrian on roadways),[3] § 291C-77 (Pedestrians soliciting rides, business or attention of motorist),[4] and § 291C-172 (Refusal to provide identification).[5] C.R. 15; E.R. at 3.

Mr. Shak was then transported to the Honolulu Police Station, where he was detained for approximately one hour. Tr. 7/27/94 at 7. While detained, Mr. Shak was finger-printed and booked, then released on $60.00 bail at approximately 6:30 p.m. E.R. at 4. Upon his release, Mr. Shak was given a bail receipt informing him of the three charges and the time to appear in court. Tr. 7/27/94 at 5-6; Mr. Shak's Brief at 4.

On December 29, 1993, Mr. Shak appeared for arraignment before Judge Dashiell in the District Court of the First Circuit, Honolulu Division. E.R. at 4. At Mr. Shak's December 29, 1993 arraignment, the Deputy Prosecuting Attorney orally read the charges

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[3]"§ 291C-76 Pedestrian on roadways. (a) Where sidewalks are provided it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway, bicycle lane, or bicycle path..." Haw. Rev. Stat. § 291C-76(a) (1993).

[4]"§ 291C-77 Pedestrians soliciting rides, business or attention of motorist. (a) Except as otherwise provided by county ordinance, no person shall stand in, walk along, or otherwise occupy a portion of a highway for the purpose of soliciting a ride, employment, business, or contributions from the occupant of any vehicle..." Haw. Rev. Stat. § 291C-77(a) (1993).

[5]"§ 291C-172 Refusal to provide identification. Any person detained for a violation of this chapter shall provide the person's name and address, or any proof thereof, or both, upon the lawful order or direction of any police officer in the course and scope of the officer's duties pursuant to this chapter." Haw. Rev. Stat. § 291C-172 (1993).

to Mr. Shak. E.R. at 5. Mr. Shak refused to enter any plea, so Judge Dashiell entered a plea of "not guilty" on behalf of Mr. Shak and set the date of March 17, 1994, as the date for Mr. Shak's trial. E.R. at 5.

On March 17, 1994, Mr. Shak appeared before Judge McKenna for trial. E.R. at 5. Again, a Deputy Prosecuting Attorney orally read the charges and a description of the offenses to Mr. Shak. E.R. at 6; Tr. 7/27/94 at 12. Mr. Shak refused to enter a plea, so Judge McKenna entered a plea of "not guilty" on behalf of Mr. Shak. E.R. at 6; Tr. 7/27/94 at 11. Mr. Shak made a motion to dismiss charges against him, alleging that the court lacked jurisdiction, which Judge McKenna denied. E.R. at 5. As the trial proceeded, Officer Tanaka testified as to what he had seen Mr. Shak doing on December 23, 1993, which led him to believe that Mr. Shak was violating the law. E.R. at 6. Based on the evidence before the court, Judge McKenna found Mr. Shak guilty of all three of the offenses, and Judge McKenna fined Mr. Shak approximately $35.00.[6] E.R. at 6; Tr. 7/27/94 at 14. Mr. Shak did not appeal his conviction. Tr. 7/27/94 at 16.

B. PROCEDURAL BACKGROUND

On April 14, 1994, Mr. Shak filed his complaint against Officer Tanaka, Chief Nakamura, Prosecutor Kaneshiro, Judge Dashiell, Judge McKenna and the State of Hawaii in United States District Court for the District of Hawaii, alleging violation of his constitu-

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[6]It is evident from Mr. Shak's Opening Brief that he does not contest this factual background. See Mr. Shak's Opening Brief at 4-7.

tional rights under the Fourth and Fourteenth Amendments. E.R. at 1-11. Officer Tanaka, Chief Nakamura and Prosecutor Kaneshiro moved for dismissal of all claims, and in the alternative, for summary judgment. C.R. 15. Judge Dashiell, Judge McKenna and the State of Hawaii joined in that motion. C.R. 16. On August 9, 1994, Judge Samuel P. King granted the Defendants' dispositive motion. E.R. at 21-24. On August 12, 1994, final judgment was filed in favor of Officer Tanaka, Prosecutor Kaneshiro, Chief Nakamura, Judge Dashiell, Judge McKenna and the State of Hawaii. E.R. at 25. Mr. Shak filed a timely Notice of Appeal on August 19, 1994. E.R. at 26-29. C.R. 23. On August 22, 1995, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. Mr. Shak filed a Petition for Rehearing, which the United States Court of Appeals for the Ninth Circuit denied on December 1, 1995. Mr. Shak then filed a Petition for Writ of Certiorari in the Supreme Court of the United States on January 30, 1996.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

A. SUMMARY OF ARGUMENT

As he states in page 9 of his Opening Brief, Mr. Shak does not contest whether Officer Tanaka had probable cause to arrest Mr. Shak without a warrant, nor does he contest the constitutional validity of his arrest. Tr. 7/27/94 at 8-9, 12- 13; C.R. 17 at 3. Rather, Mr. Shak claims (1) that Officer Tanaka and Chief Nakamura violated Mr. Shak's constitutional right to

due process by arresting and briefly detaining Mr. Shak without a probable cause hearing, and (2) that Officer Tanaka, Chief Nakamura, Prosecutor Kaneshiro, Judge Dashiell, Judge McKenna and the State of Hawaii violated Mr. Shak's constitutional right to due process because they arrested, detained, arraigned, tried and convicted Mr. Shak without filing and providing Mr. Shak with a formal written complaint.

However, Respondents assert that: (1) while the Fourth Amendment to the U.S. Constitution generally requires a judicial determination of probable cause as a condition for the pretrial detention of an arrestee, a police officer's on-the-scene assessment of probable cause provides sufficient legal justification for a brief period of detention without a probable cause hearing so that the police officer can take administrative steps incidental to the arrest; and (2) due process does not require police officers, prosecutors or courts to provide an arrestee of a misdemeanor with a copy of a written complaint, as long as the arrestee is fully informed of the charges against him or her.

B. THE WRIT PRESENTS NO FEDERAL QUESTION APPROPRIATE FOR REVIEW BY THIS COURT SINCE THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT DECISION IN THE INSTANT CASE AND APPLICABLE UNITED STATES SUPREME COURT PRECEDENTS

1. The Ninth Circuit Properly Looked To State Law To Determine That Petitioner's Detention For Approxi-

mately One Hour And Forty-Five Minutes In Order For The Officer To Take Reasonable Administrative Steps Incident To Arrest Was Well Within Hawaii's Forty-Eight Hour Maximum Time Limit For Detention Without A Judicial Determination Of Probable Cause. There Is No Inconsistency With This Court's Decisions in Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), and County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991).

Petitioner's Petition for Writ of Certiorari must be denied because it presents no federal issues for decision by this Court. The Ninth Circuit Court of Appeals decision is supported by precedent, and is not in conflict with any decisions by this Court.

The first of Mr. Shak's arguments is that Officer Tanaka and Chief Nakamura violated his constitutional rights under the Fourth and Fourteenth Amendments because Officer Tanaka arrested and briefly detained Mr. Shak without a probable cause hearing. E.R. at 3-4, 7-10.

Mr. Shak relies heavily on Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) and County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), to demonstrate an inconsistency between the Ninth Circuit decision below and United States Supreme Court precedent. That reliance is misplaced.

Gerstein v. Pugh is not inconsistent with the

decision of the Ninth Circuit. In Gerstein v. Pugh, under Florida law, "a person charged by information could be detained for a substantial period solely on the decision of a prosecutor [without first having obtained a judicial determination of probable cause]." Gerstein v. Pugh, 420 U.S. at 106. This Court held that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." Id. at 114 (emphasis added).

However, this Court in Gerstein v. Pugh, tried to balance an individual's rights against rash and unreasonable interferences with privacy and unfounded charges of crime, and a state's interest in enforcing the law for the protection of the public. This Court reasoned that a practical compromise would be that

> "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a **brief period of detention to take the administrative steps incident to arrest**. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate." Id. at 113-114 (emphasis added).

This Court in Gerstein v. Pugh also recognized that state systems of criminal procedure vary widely. This Court further stated:

> Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition

> for any **significant pretrial restraint** of liberty, and this determination must be made by a judicial officer either before or **promptly** after arrest.

Id. at 123-125 (emphasis added).

The Ninth Circuit initially "look[s] to state law to determine the lawfulness of an arrest by a state officer for a state offense. U.S. v. Shephard, 21 F. 3d 933, 936 (9th Cir. 1994). With respect to post-arrest procedures under Hawaii law, "a person arrested for a petty misdemeanor offense possesses not an absolute right to immediate release, but rather a right to release without unnecessary delay upon payment of bail." State of Hawaii v. Langley, 62 Haw. 79, 81, 611 P.2d 130, 132 (1980) (holding that a defendant's uncontrollable and disruptive behavior warranted his temporary incarceration after he had been arrested for disorderly conduct); State of Hawaii v. Vance, 61 Haw. 291, 302-303, 602 P.2d 933, 940-941 (1979) (holding that a defendant's hostile and threatening conduct at the police station justified his brief detention as a calming-down period and to prevent him from continuing his harassing behavior). "[W]hat constitutes 'unnecessary delay' requires consideration of all the facts and circumstances at the time. Relevant factors that may justify a temporary delay include the physical condition or conduct of the person arrested." State of Hawaii v. Langley, 62 Haw. at 81, 611 P.2d at 132; State of Hawaii v. Vance, 61 Haw. at 302, 602 P.2d at 941.

Like the defendant in State of Hawaii v. Langley, Mr. Shak was arrested for mere misdemeanor offenses, and thus, Mr. Shak did not possess an abso-

lute right to immediate release, but rather a right to release without unnecessary delay upon payment of bail. Officer Tanaka detained Mr. Shak for no more than a total of one and three fourths hours in order to take standard administrative steps incident to an arrest, such as transporting, booking and fingerprinting Mr. Shak (Tr. 7/27/94 at 7; E.R. at 3- 4), and thus, Officer Tanaka did not unreasonably delay Mr. Shak's release.

In the State of Hawaii, law enforcement officials can wait no longer than a maximum of forty-eight hours before they must either release arrested persons or charge them with a crime and take them before a qualified magistrate for a judicial determination of probable cause. Haw. Rev. Stat. § 803-9(5) (1993).[7] The one hour and forty-five minute time period of Mr. Shak's detention was well within Hawaii's forty-eight hour time limit.

Moreover, the Ninth Circuit holds that police officers do not violate the Fourth Amendment by arresting and detaining arrestees for as long as nineteen hours without a probable cause hearing, as long as the reason for the detention is to allow the police officers to take administrative steps that are incident to the arrests. Kanekoa v. City and County of Honolulu, 879

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[7]§803-9 Examination after arrest; rights of arrested person. It shall be unlawful in any case of arrest for examination:

. . . .

(5) To fail within forty-eight hours of the arrest of a person on suspicion of having committed a crime either to release or to charge the arrested person with a crime and take the arrested person before a qualified magistrate for examination.

Haw. Rev. Stat. § 803-9(5) (1993).

F.2d 607 (9th Cir. 1989), cert. denied, 500 U.S. 933 (1991).

In Kanekoa, police officers in Honolulu had detained intoxicated arrestees up to nineteen hours so that the arrestees could become sober and the police officers could conduct investigations. 879 F.2d 609. Despite the fact that the police eventually dropped all charges against the arrestees and released them before any probable cause hearing took place, such detention did not violate the Fourth Amendment, because the police had needed up to nineteen hours in order to take the "administrative steps" incident to the arrests. Id. at 610-611.

One cannot determine whether the time period for such "administrative steps" is reasonable merely by counting hours, because the Ninth Circuit "ha[s] rejected any per se rules and ha[s] held that the time period required by the fourth amendment depends on the circumstances of each case. Kanekoa v. City and County of Honolulu, 879 F.2d at 610. The Kanekoa court explained that "administrative steps, incident to arrest" specifically include the following:

> "[A]dministrative steps" include procedures which provide the police with basic information from the suspect. An interview may inform the police of the suspect's identity, residence, competence, and whether it is safe to release the suspect pending further proceedings. Moreover, an interview may inform the police that the case is no longer worth pursuing. It provides an early opportunity for the suspect to exculpate himself.

Id. at 611.

In the instant case, Mr. Shak was detained for approximately one hour and forty-five minutes, **a brief period of time** which was necessary for Officer Tanaka to take the **administrative steps** of transporting, fingerprinting and booking Mr. Shak, which were clearly incidental to Mr. Shak's arrest. This was **not inconsistent** with this Court's rationale in Gerstein v. Pugh, that "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a **brief period of detention to take the administrative steps incident to arrest**." Gerstein v. Pugh, 420 U.S. at 113-114 (emphasis added). The brief detention of Mr. Shak was also well within the requirements of Hawaii law requiring law enforcement officials to wait no longer than a maximum of forty-eight hours before they must either release arrested persons or charge them with a crime and take them before a qualified magistrate for a judicial determination of probable cause. Haw. Rev. Stat. § 803-9(5) (1993). Additionally, Gerstein v. Pugh addressed situations in which there was **extended restraint of liberty** following arrest. In the instant case, Mr. Shak was released after one hour and forty-five minutes. There was no extended restraint of Mr. Shak's liberty.

In addition to Gerstein v. Pugh, Mr. Shak also relies on County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). This Court in County of Riverside v. McLaughlin held that:

> A jurisdiction that provides judicial determinations of probable cause **within 48 hours of arrest** will, as a general

> matter, comply with the **promptness** requirement of Gerstein. For this reason, such jurisdictions will be immune from systemic challenges.

Id. at 56 (emphasis added).

Mr. Shak was detained for approximately one hour and forty five minutes, a brief period of time which was necessary for Officer Tanaka to take the reasonable administrative steps of transporting, fingerprinting and booking Mr. Shak which were clearly incidental to Mr. Shak's arrest. Tr. 7/27/94 at 7; E.R. at 3-4. The one hour and forty-five minute time period of Mr. Shak's detention was well within Hawaii's forty-eight hour time limit. This is clearly **not inconsistent** with this Court's holding in County of Riverside v. McLaughlin. There was no need for a judicial determination of probable cause since Mr. Shak was only briefly detained in order that administrative steps incidental to his arrest could be completed.

Mr. Shak's Fourth Amendment rights were not violated, because Mr. Shak was released as soon as Officer Tanaka had concluded with the administrative steps incident to Mr. Shak's arrest. Therefore, this Court should deny the petition for writ of certiorari, as the Ninth Circuit's affirmation of the district court's decision is not inconsistent with this Court's decisions in Gerstein v. Pugh and County of Riverside v. McLaughlin, and therefore there is no federal question appropriate for review by this Court.

2. Mr. Shak Was Not Entitled To A Grand Jury Indictment Since A Misdemeanor Conviction May Be Sought

> And Sustained On The Basis Of An Information Standing Alone. There Is No Inconsistency With The Ninth Circuit's Decision In The Instant Case And This Court's Decisions in In the Matter of George M. Bain, Jr., 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887) and Albrecht v. United States, 273 U.S. 1, 47 S.Ct. 250, 71 L.Ed. 505 (1927).

The second of Mr. Shak's arguments is that due process requires the prosecutor to file and present a formal written complaint to an arrestee for a misdemeanor violation prior to a court hearing. Mr. Shak relies on this Court's decisions in In the Matter of George M. Bain, Jr., 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887) and Albrecht v. United States, 273 U.S. 1, 47 S.Ct. 250, 71 L.Ed. 505 (1927), to demonstrate an inconsistency between the Ninth Circuit decision below and United States Supreme Court precedent. That reliance is misplaced.

In the Matter of George M. Bain, Jr. is not applicable to the situation in the instant case. In the Matter of George M. Bain, Jr. concerned the issue of whether or not a petitioner's indictment, originally found by a grand jury, can be amended without reassembling the grand jury, and defendant thereafter tried by a court based on the amended indictment. In the Matter of George M. Bain, Jr. at 3. This Court held that:

> the indictment on which [Mr. Bain] was tried was no indictment of a grand jury. [S]ound principle require[s] us to hold

> that after the indictment was changed it was no longer the indictment of the grand jury who presented it. If there is nothing before the court which [Mr. Bain], in the language of the Constitution, can be 'held to answer,' he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned.

Id. at 13.

In the instant case, Mr. Shak was **not entitled** to a grand jury indictment. "The grand jury requirement of the Fifth Amendment is not applicable to the states, and accordingly, prosecution via an information is not unconstitutional." James v. Reese, 546 F.2d 325, 327-28 (9th Cir. 1976) (emphasis added); see also Morford v. Hocker, 394 F.2d 169 (9th Cir. 1968). Mr. Shak's reliance on In the Matter of George M. Bain, Jr. is misplaced, as it is not applicable to his situation.

Mr. Shak also relies on Albrecht v. United States, 273 U.S. 1, 47 S.Ct. 250, 71 L.Ed. 505 (1927) to demonstrate an inconsistency between it and the Ninth Circuit decision below with regards to whether or not a court acquires jurisdiction over a person absent the filing and presentation of a formal written complaint to an arrestee.

Albrecht v. United States concerned defects in the information and affidavits which charged the defendants with violations of the National Prohibition Act. 273 U.S. at 3. The defendants argued that the district court had no jurisdiction over them because of the defects, and that their rights guaranteed by the

Fourth Amendment were violated. Id. at 4.

The defendants were, however, already held under their bonds, and therefore under the jurisdiction of the court, in spite of the fact that they were held under a warrant supported by an unverified affidavit. Id. at 10. The government thereafter filed properly verified affidavits by leave of court. Id. at 10. This Court held that:

> The defect in the proceeding by which they had been brought into court had been cured. By failing to move to quash the warrant before the defect had been cured, the defendants lost their right to object.

Id. at 10. The defendants were, in essence, within the territorial jurisdiction of the court, in spite of defects in the information and affidavits. Id. at 9.

Mr. Shak, in the instant case, claims that his arraignment and trial were constitutionally invalid because no one filed a formal written complaint against him, and, [a] person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court. Albrecht v. United States, 273 U.S. at 8. However, in the very same case which Mr. Shak cites, the U.S. Supreme Court also stated that "[w]here there was an appropriate accusation either by indictment **or information**, a court may acquire jurisdiction over the person of the defendant by his voluntary appearance." Id. (emphasis added). Mr. Shak did in fact appear for arraignment before Judge Dashiell on December 29, 1993. E.R. at 4. He also appeared before

Judge McKenna for trial on March 17, 1994. E.R. at 5. Mr. Shak also made a motion to dismiss charges against him at the trial, alleging that the court lacked jurisdiction. E.R. at 5. Judge McKenna denied the motion. E.R. at 5. This was not inconsistent with this Court's decision in Albrecht v. United States.

Furthermore, it was not necessary for law enforcement authorities to file a formal complaint prior to Mr. Shak's arraignment and trial for his misdemeanor violations, because "**a misdemeanor conviction may be sought and sustained upon the basis of an unverified Information standing alone.**" Church v. United States, 412 F.2d 836, 838 (9th Cir. 1969) (emphasis added). In Church v. United States, the court affirmed the United States District Court for the District of Hawaii's decision to convict a defendant of a misdemeanor offense, "retention of stolen property," despite the defendant's claim "that the proceedings were improperly instituted because no complaint was filed prior to and in support of the Information." 412 F.2d at 838 (emphasis added).

Like the offense in Church v. United States, Mr. Shak's three offenses were mere misdemeanors, the resulting penalty for which was a mere monetary fine of $35.00, and thus, Mr. Shak was not entitled to a formal complaint. E.R. at 6, and Tr. 7/27/94 at 14. Upon his release on bail, Mr. Shak was given a bail receipt informing him of the charges and the time to appear in court. Tr. 7/27/94 at 5-6; Mr. Shak's Brief at 4. Additionally, before Mr. Shak's conviction, a deputy prosecutor orally read the formal charges to Mr. Shak at least two times in open court. E.R. at 5-6; Tr. 7/27/94 at 12. Clearly, Mr. Shak was fully aware of the charges

he was facing in order to adequately defend himself. Thus, it did not offend the United States Constitution when the prosecuting attorney sought to convict Mr. Shak on the basis of an information standing alone. No filing of a formal complaint was necessary. Therefore, this Court should deny the petition for writ of certiorari, as Mr. Shak was not entitled to a grand jury indictment since a misdemeanor conviction may be sought and sustained on the basis of an information standing alone. Additionally, the Ninth Circuit's decision is not inconsistent with this Court's decisions in In the Matter of George M. Bain, Jr. and Albrecht v. United States, and therefore there is no federal question appropriate for review by this Court.

C. THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT DECISION IN THE INSTANT CASE AND DECISIONS IN OTHER CIRCUIT COURTS OF APPEALS THAT FORMAL ARRAIGNMENT IS NOT NECESSARY, AND THERE IS NO DENIAL OF DUE PROCESS, WHERE AN ARRESTEE IS FULLY INFORMED OF THE CHARGES AND IS ADEQUATELY ABLE TO DEFEND AGAINST THEM

It is well established in federal courts that due process does not require a formal arraignment as long as the criminal defendant knows what he is accused of and he is able to defend himself. United States v. Romero, 640 F.2d 1014, 1015 (9th Cir. 1981); see also

Garland v. Washington, 232 U.S. 642, 645 (1914).

In Dell v. State of Louisiana, 468 F. 2d 324, 325 (5th Cir. 1972), cert denied, Dell v. Louisiana, 411 U.S. 938 (1973), the petitioner alleged that he was denied due process because he was not formally arraigned nor given actual notice of what he was charged with prior to trial. 468 F.2d at 325. The Fifth Circuit Court of Appeals affirmed the district court's finding that "petitioner did in fact know of the armed robbery charges which were lodged against him in [the] case and that when he went to trial he was fully cognizant of the fact that he was being tried for armed robbery." Id. at 325. In United States v. Hart, 457 F.2d 1087, 1089 (10th Cir. 1972), cert. denied, Hart v. U.S., 409 U.S. 861 (1972), the defendant alleged that he was not formally arraigned. 457 F.2d at 1089. The Tenth Circuit Court of Appeals, however, stated that "[a]lthough there is no evidence in the record to indicate whether [defendant] was formally arraigned, the general rule is that arraignment under Rule 10 [of the Federal Rules of Criminal Procedure] is not necessary when the defendant knows what he is accused of and is able to adequately defend himself. Id. at 1089 (citing Garland v. Washington, 232 U.S. 642 (1914)). The Tenth Circuit Court of Appeals further stated that "[t]he record reflects that [defendant] was well appraised of the charges against him and that he was fully prepared for trial. There was no denial of due process." Id. at 1089.

In Bradley v. United States, 447 F.2d 264, 270 (8th Cir. 1971), vacated on other grounds, 404 U.S. 567 (1972), there was the absence of a proper arraignment since defendant was determined to be incompetent on

the date the arraignment was held. 447 F.2d at 270. However, the Eighth Circuit Court of Appeals stated that "the absence of a proper arraignment does not in itself require a reversal; prejudicial error is essential to require reversal; none has been suggested here[.]" Id. at 270. Accordingly, a conviction will not be vacated for lack of formal arraignment proceedings unless possible prejudice is shown. United States v. Romero, 640 F.2d 1014, 1015 (9th Cir. 1981); see also United States v. Grote, 632 F.2d 387, 389 (5th Cir. 1980), cert. denied, Grote v. United States, 454 U.S. 819 (1981).

"Even in those instances where the defendant has not been furnished a copy of the indictment and a post-trial attack has been mounted, - it has been held that no prejudice warranting vacation of the conviction results if the charges were read and explained to the defendant before the jury was sworn." United States v. Bey, 499 F.2d 194, 201 (3d Cir. 1974), cert. denied, Bey v. United States, 419 U.S. 1003 (1974).

Moreover, the Hawaii Rules of Penal Procedure Rule 5 (b) (1) provide that "[i]n the district court, if the offense charged against the defendant is other than a felony, the complaint shall be filed or the **oral charge stated**, [and] a copy of such charge and any affidavits in support thereof shall be furnished the defendant upon his request[.]" Haw. R. Penal P. 5 (b) (1). However, the underlying purpose of filing a complaint for an arraignment is merely to ensure that an arrestee understands the pending charges. 1 Charles A. Wright, Federal Practice and Procedure § 162, at 551, 552 (1982). In non-felony cases, the accused is **orally**

apprised of the pending charges in open court,[8] and thus, the Supreme Court of Hawaii holds that "the omission to furnish a copy [of a complaint] is not jurisdictional." Shak v. Doi, 49 Haw. 404, 406, 420 P.2d 100, 102 (1966) (emphasis added).

Other circuit courts of appeals have held that there is no denial of due process when a defendant understands the charges against him which are read to him in open court, in spite of the fact that he is not given a copy of the indictment or information. If a government prosecutor has read all charges to a defendant in open court, "the failure, if any, to provide [the] defendant with a copy of the information [i]s not a denial of due process." Richardson v. United States, 217 F.2d 696, 698 (8th Cir. 1954) (emphasis added); Ray v. United States, 192 F.2d 658, 659 (5th Cir. 1951). Merritt v. Hunter, 170 F.2d 739, 741 (10th Cir. 1948).

Upon his release on bail, Mr. Shak was given a bail receipt informing him of the charges and the time for him to appear in court. Tr. 7/27/94 at 5-6; Mr. Shak's Opening Brief at 4. Furthermore, before Mr. Shak's conviction, a deputy prosecutor orally read the formal charges to Mr. Shak in open court on two separate occasions. E.R. at 5-6; Tr. 7/27/94 at 12. Any alleged failure to provide Mr. Shak with a formal written complaint did not deny Mr. Shak due process under the Fourth and Fourteenth Amendments to the United States Constitution. Therefore, this Court

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[8]Under Hawaii Rules of Penal Procedure Rule 5(b)(1), "[a]rraignment shall be in open court and shall consist of the reading of the complaint or the statement of the oral charge to the defendant, or stating to him the substance of the charge and calling on him to plead thereto." Haw. R. Penal P. 5(b)(1).

should deny the petition for writ of certiorari, as the Ninth Circuit's decision is not inconsistent with decisions in other circuit courts of appeals that formal arraignment is not necessary, and there is no denial of due process, where the defendant knows what he or she is accused of and is adequately able to defend himself or herself. Therefore, there is no federal question appropriate for review by this Court.

D. CONCLUSION

For the reasons above-cited, Respondents Keith Tanaka, Michael Nakamura, and Keith Kaneshiro respectfully request that Petitioner's Petition for Writ of Certiorari be denied and that Respondents Keith Tanaka, Michael Nakamura, and Keith Kaneshiro be given such other relief as this Honorable Court may deem just and proper.

DATED: Honolulu, Hawaii, March 27, 1996.

Respectfully submitted,

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Supreme Court, U.S.
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CASE NO. 95-1222

In The
SUPREME COURT OF THE UNITED STATES
October Term 1995

CLARENCE N. S. SHAK, *Petitioner*,

vs.

KEITH TANAKA, etc., et al., *Respondents*

Petition for Writ of Certiorari to
the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Petitioner's Reply Brief 1

I. This Court Should Grant This Petition Because An Extended Restraint Was Imposed Upon Petitioner's Liberty 2

II. This Court Should Grant This Petition Because Petitioner Was Deprived Of His Liberty And Property Without Due Process Of Law 3

Conclusion 4

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION — Pages

Amendment 4 2,3

Amendment 14 4

SUPREME COURT RULES

Rule 14.1 (a) 1

CASES

County of Riverside v. McLaughlin
500 U.S. 44 2

Gerstein v. Pugh, 420 U.S. 103 2,3

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CLARENCE N. S. SHAK, *Petitioner*,

vs.

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PETITIONER'S REPLY BRIEF

Petitioner is uncertain as to whether or not this Reply Brief needs to be filed for it is here believed that the brief filed by Respondents Keith Tanaka, Michael Nakamura, and Keith Kaneshiro in opposition to the Petition for Writ of Certiorari filed in this case will likely not even be considered by this Court and the Counsel of Record (Girard Douglas Lau) for Respondents Katherine Dashiell, Sabrina McKenna, and State of Hawaii has already indicated that he does not intend to file a response to the above mentioned petition unless one is requested by the Court.

Petitioner believes that the brief filed by Respondents Keith Tanaka, Michael Nakamura, and Keith Kaneshiro in opposition to the Petition for Writ of Certiorari filed in this case is frivolous in nature because that brief does not even address the questions presented by Petitioner in his petition but instead provides answers to other questions evidently fabricated by the attorneys representing the above named respondents.

Petitioner's belief that the brief filed by Respondents Keith Tanaka, Michael Nakamura, and Keith Kaneshiro in opposition to the Petition for Writ of Certiorari filed in this case will likely not even be considered by this Court is based on his understanding of Rule 14.1 (a) of the Supreme Court

rules which includes the statement, "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court."

I.

THIS COURT SHOULD GRANT THIS PETITION BECAUSE AN EXTENDED RESTRAINT WAS IMPOSED UPON PETITIONER'S LIBERTY.

Respondents in their brief have taken the position that there was no extended restraint imposed upon Petitioner's liberty in the instant case. It appears to Petitioner that Respondents have taken this position because they do not realize that when this Court used the expression "extended restraint of liberty" in *Gerstein* v. *Pugh*, 420 U.S. at 114, in which this Court said, "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest..." the Court did not mean a restraint imposed upon an arrested person's liberty for a substantial period of time (as Respondents evidently believe the Court means) but meant a restraint on the liberty of such a person above and beyond the period of time a restraint is constitutionally permitted to be imposed upon such a person's personal liberty.

Bearing in mind the fact that this Court established in *Gerstein* together with *County of Riverside* v. *McLaughlin*, 500 U.S. 44, that a police department is constitutionally permitted to impose a restraint upon the liberty of a person arrested without a warrant but only for as long as such a restraint is necessary "to take the administrative steps incident to arrest" and, in general, no longer than 48 hours after the warrantless arrest has been made, it becomes evident that if such a person is released from the custody of the police department it would be after the police department has

completed taking the administrative steps incident to such an arrest. Therefore, if a restraint were to be placed upon that released person's liberty such as by requiring that person to appear in a certain court on a certain date in the future, such a person has had an "extended restraint" imposed upon his or her liberty. In such a case, this Court said in *Gerstein*, a judicial determination of probable cause must first be made in order to justify the imposition of such a restraint or the state will have violated that person's Fourth Amendment guarantee of freedom.

A writ of certiorari should be granted because the facts in this case clearly show that Petitioner had an extended restraint imposed upon his liberty and no judicial determination of probable cause was ever made in this case.

II.

THIS COURT SHOULD GRANT THIS PETITION BECAUSE PETITIONER WAS DEPRIVED OF HIS LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW.

The facts of this case as set forth on pages 2-4 of the brief of Respondents Keith Tanaka, Michael Nakamura, and Keith Kaneshiro in opposition to the Petition for Writ of Certiorari filed in this case clearly indicate that Respondents are not only fully aware of but further agree with the fact that there was no written accusation of any kind filed against Petitioner in the court in which Petitioner was prosecuted and that court had assumed it had jurisdiction over Petitioner, had put him on trial, and had fined him after he had been found guilty of having committed certain offenses.

Petitioner is therefore puzzled as to why Respondents argue that it is well established in law that if an information is

filed in any misdemeanor case, there is no need for a complaint to be filed in that case. Since Respondents knew or should have known full well that there was no information filed in the instant case, it must be said that the above argument by Respondents is frivolous in nature.

Petitioner is further puzzled as to why Respondents argue in their brief that due process does not require an arraignment and does not require that a copy of a formal charge be given to a criminal defendant as long as that person knows what he of she is accused of and he or she is able to defend himself or herself. Petitioner has already shown on page 12 of his petition that just as a person who is already dead cannot ever be murdered, it has been well established in law that a person, such as Petitioner, who has not had any written accusation filed against him or her charging him or her with having committed a certain offense cannot ever be prosecuted for having committed that offense. This is true even if the accused person "knows what he or she is accused of and he or she is able to defend himself."

The Court should grant this petition because the prosecution of Petitioner was carried out without due process of law. The Fourteenth Amendment of the Constitution of the United States, of course, forbids such a prosecution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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